



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

Case #: FOF - 161173

Pursuant to a petition filed October 14, 2014, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Office of Inspector General to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on December 4, 2014, at [REDACTED]

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:

Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Respondent (CARES # [REDACTED]) received FoodShare benefits in Milwaukee County from July 15, 2013 through August 31, 2013. (Exhibit B)
2. On July 15, 2013, the Respondent electronically signed an application summary, confirming the information was complete and correct. In that summary, the Respondent indicated that he lived on [REDACTED] in [REDACTED] (Exhibit E)

3. On November 25, 2013, the Respondent completed and signed a Six Month Report Form (SMRF) indicating that he lived at the address on [REDACTED], but that his mailing address was [REDACTED] in [REDACTED] (Exhibit I)
4. On June 25, 2014, the Respondent completed an on-line ACCESS renewal indicating that he lived on [REDACTED] but received mail at the address on [REDACTED]. The Respondent electronically signed the renewal, indicating the information was correct and complete. (Exhibit K)
5. Between April 2013 and August 17, 2014, the Respondent's EBT card usage was exclusively in [REDACTED] (Exhibit O)
6. On October 14, 2014, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that the Respondent committed an Intentional Program Violation (IPV) by failing to report his move to [REDACTED] and by misreporting his address as an in-state address. (DHA file)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

Emphasis added

The hearing in this case took place on December 4, 2014. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to him at an address on North [REDACTED] [REDACTED]. Ms. Johnson indicated that this was the Respondent's last known mailing address and that the agency did not receive any returned mail.¹

The Respondent was directed to go to Milwaukee Enrollment Services, 1220 West Vliet Street for this hearing. He did not appear for the hearing. An attempt was made to contact him at the number last known to the Department of Health

¹ This is a bit confusing given that the agency asserts the Respondent is living in [REDACTED]. It is unclear what efforts, if any, were made to locate the Respondent in [REDACTED]. It might behoove OIG, in the future, to exercise due diligence to locate Respondents in the state they are alleged to have moved to, i.e. driver's license / state ID checks, etc. Indeed, OIG cannot claim an inability to locate someone under 7 C.F.R. §273.16(e)(4), above, if they have not made an effort to find them in the first place. Further, a disingenuous search for a Respondent or a failure to exercise due diligence to locate a Respondent could very well be considered a violation of procedural due process.

Services, (414) 514-9884, but the outgoing message indicated that the number was disconnected. Consequently, the hearing took place in the Respondent's absence.

The Respondent did not contact the Division of Hearings and Appeals within 10 days to explain his failure to appear. As such, it is found that the Respondent did not have good cause for his non-appearance.

What is an Intentional Program Violation?

7 C.F.R. §273.16(c) states that Intentional Program Violations "shall consist of having intentionally: 1) Made a false or misleading statement or misrepresented facts; or 2) Committed an act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization card or any other reusable documents used as part of an automated delivery system (access device)."

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is OIG's burden of Proof?

In order for the agency to establish that a FoodShare recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" (a.k.a. "more likely than not") used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty

need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the elements have been shown.

The Merits of OIG’s Case

In the case at hand, the Office of the Inspector General (OIG) asserts that the Respondent violated the rules of the FoodShare Program by lying about his residence between July 15, 2013 and August 31, 2014.

OIG has provided an application summary, a six month report form and a renewal, that the Respondent completed. (Exhibits E, I and K) These documents are reliable as regularly kept records of the Department of Health Services and as statements of a party opponent. As such, they are sufficient to show that the Respondent reported a Wisconsin residence during the time in question.

OIG also provided, in Exhibit O, a compilation of the Respondent’s EBT card usage, created by Ms. Johnson who testified credibly that she obtained the information from the EBT Edge database. The information from the EBT database is reliable as a regularly kept business record of the Department of Health Services. Exhibit O is sufficient to show that the Respondent’s EBT card usage was exclusively in [REDACTED] during the time in question. This would lead one to reasonably conclude that the Respondent was actually living in [REDACTED] and lying in the Wisconsin application summary, six month report form and his renewal.

As discussed above, making a false or misleading statement or misrepresenting facts to obtain foodstamps is prohibited. 7 C.F.R. §273.16(c). Further, “A household shall live in the State in which it files an application for participation” in the food stamp program. 7 CFR §273.3(a) As such, it is found that the Respondent violated the rules of the Foodshare program by receiving food stamps in Wisconsin while living in [REDACTED] and by providing false/misleading information concerning a Wisconsin residence.

Intention is a subjective state of mind to be determined upon all the facts, Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183 (1977), but there is a general rule that a person is presumed to know and intend the probable and natural

consequences of his or her own voluntary words or acts. See John F. Jelke Co. v. Beck, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131.

There is no evidence in the record to rebut the presumption that the Respondent intentionally provided Wisconsin with false information concerning his residence. On the contrary, the Respondent was warned when he signed the application summary, his renewal and his SMRF that he could be penalized for providing false information, but he did it anyway. (See Exhibits E, I and K)

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rules specifying that a household shall live in the State in which it files an application for participation” in the food stamp program and that it provide correction information.
2. The violations specified in Conclusion of Law No. 1 are the first such violation committed by the respondent.

NOW, THEREFORE, it is ORDERED

That OIG’s determination is sustained, and that OIG may make a finding that the Respondent committed a first IPV of the FoodShare program and disqualify the Respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

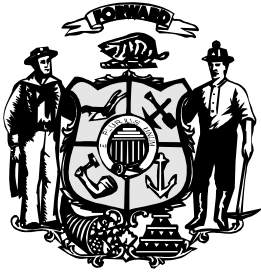
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee, Wisconsin,
this 15th day of December, 2014.

\sMayumi Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Sherrie Johnson - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on December 15, 2014.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
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